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No. 74-1232

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

BELTRONICS, INC., Petitioner,

v.

EBERLINE INSTRUMENT CORPORATION,
CAPCO, INC.,
and
WESTERN ELECTRIC COMPANY, INCORPORATED,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioner Beltronics, Inc. hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado is reported at 369 F. Supp. 295 (Colo. 1973), and the opinion of the United States Court of Appeals for the Tenth

Circuit is reported at 1974 CCH Trade Cas. ¶75,385. Both opinions are reprinted in the Appendix to this Petition. (App. 1a and 23a).

JURISDICTION

The decision of the Court of Appeals, which constitutes its judgment, was entered on December 4, 1974. On December 31, 1974 the Court of Appeals denied Petitioner's timely Petition for Rehearing. (App. 34a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is Section 1 of the Sherman Act violated when a manufacturer sells component products to another manufacturer subject to the contractual restrictions that (i) the component products be used only to manufacture certain end products, and that (ii) after manufacture the end products be sold only to the first manufacturer, where the first manufacturer then resells the end products, without physical change, to the ultimate consumers, and where but for the restrictions on resale the second manufacturer could itself sell the end products directly to the ultimate consumers?

2. Is the exclusive sales representative of the second manufacturer injured in its business or property by reason of the restrictions on resale of both the component products and end products when the first manufacturer uses the market control it has obtained

through the resale restrictions to prevent competition with it for sale of the end products to the ultimate consumers, refuses to do business with the sales representative, and forces the second manufacturer to terminate its contractual relationship with the sales representative?

3. May the exclusive sales representative of the second manufacturer base a projection of what its profits would have been, after the date its business was destroyed, partly upon its past earnings as an exclusive sales representative for another manufacturer which manufactured the same products and sold them to the same customers, and upon the continuing sales of the second manufacturer?[1]

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1 Petitioner will not argue here the reasons for granting the writ as to question No. 3, and it does not urge that question as an independent ground for the exercise of this Court's certiorari jurisdiction. However, should the Court grant certiorari on questions Nos. 1 and 2, Petitioner urges that it also grant certiorari with respect to question No. 3 since the District Court failed to follow the decisions of this Court relating to the degree of certainty required in proving the amount of damages after the fact of damage has been established, and excluded the bulk of Petitioner's proposed evidence relating to the measurement of damages. See Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931); and Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . .."

Section 4 of the Clayton Act, 15 U.S.C. §15, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

Beltronics, Inc. ("Beltronics") seeks review of the decision of the United States Court of Appeals for the Tenth Circuit affirming the decision of the United States District Court for the District of Colorado denying recovery to Beltronics. The basis of jurisdiction of the District Court was 15 U.S.C. §15.

Beltronics, a Colorado corporation, was the exclusive sales representative of Eberline Instrument Corporation ("Eberline") and its wholly owned manufacturing subsidiary, Capco, Inc. ("Capco"), (Eberline and Capco will sometimes be referred to collectively as "Eberline") for sale of capacitors and capacitor cases to the telephone industry throughout the United States. Western Electric Company, Incorporated ("Western Electric") is a wholly owned subsidiary of American Telephone & Telegraph Company ("AT&T"), which in turn owns all or a substantial percentage of 23 subsidiary operating telephone companies ("Bell Telephone Companies"). Bell Telephone Laboratories ("Bell Laboratories") is owned one-half by AT&T and one-half by Western Electric. AT&T, Bell Laboratories and the Bell Telephone Companies were not parties to this litigation.[2]

From 1956 to 1960, Landes, Zachary & Peterson, Inc., a predecessor of Beltronics, purchased capacitors from a manufacturer and resold them directly to the Mountain States Telephone & Telegraph Company ("Mountain Bell") at Mountain Bell's various locations in eight states. In 1960 this business was transferred to Beltronics which shortly thereafter (sub. nom. Midwec Sales Company) became the exclusive sales representative of Midwec Corporation for sale of capacitors manufactured by Midwec Corporation to the telephone industry.

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2 A copy of the Appendix filed with the Court of Appeals has been lodged with the Clerk of the Court.

During 1960 Beltronics sold $18,000 worth of capacitors manufactured by Midwec Corporation directly to Mountain Bell. By the end of 1961 Midwec Corporation had added capacitor cases to its product line and Beltronics had expanded its list of customers. In 1961 Beltronics sold $204,000 worth of capacitors and capacitor cases directly to the Pacific Telephone Company, Southwestern Bell Telephone Company, Southern Bell Telephone Company and the Wisconsin Telephone Company, in addition to Mountain Bell. All of these telephone companies were owned wholly or in part by AT&T. The only other company known to Beltronics to be selling these products directly to these Bell Telephone Companies during this period was Western Electric.

In September, 1961 an officer of Beltronics was summoned to New York City by an AT&T engineer and told that AT&T did not like to have anything sold in volume directly to the Bell Telephone Companies without first passing through the hands of Western Electric and being approved by Bell Laboratories. Beltronics was told that a supply contract with Western Electric was required.

On the afternoon of the same day an employee of Western Electric told Beltronics that Western Electric looked with disfavor upon Beltronics selling directly to the Bell Telephone Companies, and that it was a hard and fast rule that products sold to the Bell Telephone Companies had to be sold through Western Electric and

be manufactured in accordance with Bell Laboratories specifications.

Bell Laboratories then requested and was supplied with the manufacturing specifications used by Midwec Corporation, and over the next several months developed its own specifications for the capacitors and capacitor cases which Beltronics had been selling directly to the indicated Bell Telephone Companies. These specifications required that wire and cable manufactured by Western Electric be used in the capacitors and capacitor cases.[3]

In March, 1962, after these specifications were issued by Bell Laboratories, Western Electric and Midwec Corporation entered into a supply contract providing for the purchase of the capacitors and capacitor cases by Western Electric from Midwec Corporation. This supply contract required that the products be manufactured according to the Bell Laboratories specifications, and contained a provision whereby Western Electric agreed to sell to Midwec Corporation the Western Electric manufactured wire and cable required by the specifications. The contract provided further, however, that the wire and cable once purchased by Midwec Corporation was to be used solely for

3 The specifications contained the language "or equivalent" but there was no evidence that wire or cable manufactured by anyone other than Western Electric was ever accepted by Western Electric, Bell Laboratories or the Bell Telephone Companies after the specifications were issued.

the performance of the supply contract. It required that all orders for the wire and cable include a statement that the material was to be used exclusively in the manufacture of articles for Western Electric.

Following execution of the supply contract between Western Electric and Midwec Corporation, Beltronics, acting as the exclusive sales representative of Midwec Corporation, sold the capacitors and capacitor cases manufactured with the Western Electric wire and cable to Western Electric as required by the supply contract, rather than directly to the Bell Telephone Companies as it had previously done. An officer of Beltronics testified that the supply contract "made us sell the products back to Western Electric". Western Electric in turn simply resold the products to the Bell Telephone Companies.

Title to, dominion over, and risk of loss of the wire and cable sold by Western Electric under the supply contract passed to Midwec Corporation.

The supply contract between Western Electric and Midwec Corporation was an annual contract which was renewed at least through 1967.

In 1967 Beltronics terminated its relationship with Midwec Corporation, and in 1968 was purchased by Eberline which at the same time purchased Capco. The purpose of these acquisitions by Eberline was to obtain a capacitor manufacturer

and an experienced sales representative to enable Eberline to supply capacitors and capacitor cases to the telephone industry. Thereafter a supply contract was entered into between Western Electric and Eberline. It contained the same provisions for sale and restrictions on resale of the Western Electric manufactured wire and cable that were present in the Midwec Corporation supply contract.

In January, 1969, Beltronics was repurchased from Eberline by its former shareholders. As part of the repurchase Beltronics entered into an Exclusive Sales Representative Agreement with Eberline and Capco whereby Beltronics became their exclusive sales representative for sale of capacitors and capacitor cases to the entire telephone industry throughout the United States. This Agreement was to run for five years, and was renewable by Beltronics for an additional five year period. Beltronics was to receive a 15% sales commission. Beltronics then commenced negotiations with Western Electric for a renewal of the existing supply contract which was scheduled to expire on May 1, 1969.

At a meeting in New York City on April 14, 1969, Western Electric advised Eberline and Beltronics that Western Electric would do no further business with Beltronics, or with Eberline so long as Beltronics was associated with Eberline. Eberline then terminated its relationship with Beltronics and Beltronics went out of business.

REASONS FOR GRANTING THE WRIT

The Court of Appeals erroneously distinguished this case from United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), and consequently rendered a decision on the wire and cable resale restrictions issue which is in clear conflict with this Court's decision in Schwinn. The Court of Appeals' further decision that in any event Beltronics was not damaged by the resale restrictions conflicts with this Court's decision in Perkins v. Standard Oil Company of California, 395 U.S. 642 (1969), and with application of both of the analytical techniques utilized by virtually all the lower courts when deciding the causation issue.

I

THE COURT OF APPEALS ERRONEOUSLY DISTINGUISHED THIS CASE FROM UNITED STATES V. ARNOLD, SCHWINN & CO. AND CONSEQUENTLY RENDERED A DECISION WHICH IS IN CLEAR CONFLICT WITH THIS COURT'S DECISION IN SCHWINN

The Court of Appeals ruled that this case did not involve a vertical relationship such as that in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), that there was no impediment to competition, and that consequently Schwinn has no application. (App. 31a.) This ruling cannot stand when applied to the facts found by the District Court. As applied to the facts it can only be regarded as a

misinterpretation of Schwinn which, if uncorrected, will stand as authority for a substantial departure from the clear principal announced by this Court.

Prior to the first supply contract between Western Electric and Midwec Corporation in 1962, Beltronics sold capacitors and capacitor cases on behalf of Midwec Corporation directly to a number of the Bell Telephone Companies. The wire and cable used in these capacitors and capacitor cases was purchased from General Cable Corporation. Thus, the vertical distributional chain of the wire and cable was from General Cable Corporation to Midwec Corporation, and from Midwec Corporation, incorporated in capacitors and capacitor cases, through Beltronics directly to the ultimate purchasing Bell Telephone Companies.

This vertical distributional chain was altered when Bell Laboratories issued its specifications requiring that wire and cable manufactured by Western Electric be utilized in these products.[4]

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4 Petitioner contends that once these specifications were issued the Bell Telephone Companies would and did purchase only products which conformed to the specifications. This contention is buttressed by Western Electric's admission that during 1968 and 1969 it supplied substantially all the Bell Telephone Companies' requirements of the products. Discovery of evidence of this practice for the years 1962-1967 was denied Beltronics. This practice, however, can clearly be inferred for the earlier years from the totality of evidence produced at trial.

Thereafter in order to comply with these specifications and to sell to the Bell Telephone Companies Midwec Corporation (and later Eberline) had to enter into a supply contract with and purchase wire and cable from Western Electric. Had it not been for the resale restrictions in these supply contracts the vertical distributional chain of the wire and cable would then have been from Western Electric to Midwec Corporation (and later Eberline) and from Midwec Corporation (and later Eberline), incorporated in capacitors and capacitor cases, through Beltronics to the Bell Telephone Companies and other telephone companies in the telephone industry. However, because of the resale restrictions Midwec Corporation (and later Eberline) was required to sell the capacitors and capacitor cases to Western Electric which in turn, without physically changing the products, resold them to the Bell Telephone Companies.

These facts are not distinguishable from the facts in Schwinn. There this Court considered the effect of resale restrictions on intrabrand competition in the sale of bicycles. Schwinn franchised retailers who were allowed to purchase only from or through the distributor authorized to serve a particular area, and were authorized to sell only to consumers and not to unfranchised retailers. The distributors when purchasing from Schwinn were allowed to sell only to franchised Schwinn accounts in their respective territories.

This Court held these resale restrictions illegal per se in those situations where the distributor and retailer purchased the bicycles.

> "Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred--whether by explicit agreement or by silent combination or understanding with his vendee--is a per se violation of §1 of the Sherman Act." 388 U.S. at 382.

In Schwinn, competition between distributors for sales to retailers and between retailers for sales to consumers was impeded by the resale restrictions imposed by Schwinn. In this case the resale restrictions imposed by Western Electric ended all competition with Western Electric for sale of capacitors and capacitor cases to the Bell Telephone Companies.

The Court of Appeals' statement that "in effect Western bought the cable back, albeit in a different form" (App. 31a), ignores the central fact that by the resale restrictions Western Electric artificially inserted itself into the existing vertical chain of distribution to the ultimate purchasers with the consequent elimination of competition for sale of these products to the Bell Telephone Companies.

These restrictions also prevented unfettered resale of the wire and cable, either as such or incorporated in other products, to the non-Bell consuming telephone industry.

The facts of this case show even a more extensive restraint on competition than was involved in Schwinn. In Schwinn the only product the resale of which was restrained was bicycles. In this case the resale restrictions covered not only the wire and cable as such but also extended to capacitors and capacitor cases incorporating the wire and cable, products which Western Electric did not even manufacture.

By ruling in Schwinn that "it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it", 388 U.S. at 379, this Court laid down a rule of law which governs this case but which was not applied by the Court of Appeals. The failure of the Court of Appeals to apply the rule of Schwinn is an unwarranted dilution of this Court's clear directive, and if uncorrected can only give support to the efforts of others to evade the Schwinn doctrine by manipulations placing form over reality.

II

THE COURT OF APPEALS' RULING THAT BELTRONICS WAS NOT DAMAGED BY THE RESALE RESTRICTIONS

CONFLICTS WITH THIS COURT'S DECISION IN PERKINS V. STANDARD OIL COMPANY OF CALIFORNIA AND WITH APPLICATION OF THE CAUSATION ANALYSES APPLIED BY VIRTUALLY ALL THE LOWER COURTS

The Court of Appeals ruled there was nothing in the record to show that Beltronics was, or could have been, damaged by the resale restrictions. (App. 31a-32a). This ruling, which was not discussed by the Court of Appeals in terms of any statute or case law or otherwise analyzed, is in conflict with this Court's decision in Perkins v. Standard Oil Company of California, 395 U.S. 642 (1969), and with both of the causation analyses utilized by virtually all the lower courts.

Section 4 of the Clayton Act, 15 U.S.C. §15, establishes two requirements which a plaintiff must satisfy before it may recover for a violation of the antitrust laws. First, a plaintiff must prove injury to his "business or property." Second, a plaintiff must prove that the injury suffered was occasioned "by reason of" an antitrust violation. Hawaii v. Standard Oil Company of California, 405 U.S. 251, 261, 262 n.14, 264 (1972); In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 126 (9th Cir. 1973), cert. denied, 414 U.S. 1045 (1973).

In Hawaii this Court held that the words "business or property" refer to commercial interests or enterprises,

citing, among other cases, Roseland v. Phister Mfg. Co., 125 F.2d 417 (7th Cir. 1942). 405 U.S. at 264. Clearly the business of Beltronics as a sales agent possessing an exclusive territory of the entire United States for sale of specific products to an established clientele constitutes "business or property" within the decision of this Court in Hawaii. Beltronics' business is virtually identical to the business of the sales agent plaintiff in Roseland.

Numerous lower court decisions have considered the second requirement, that the injury suffered was occasioned "by reason of" an antitrust violation, and two analytical techniques have been employed--the "direct injury" and the "target area" approaches. No uniform definition of "by reason of" has been formulated, however. In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d at 126, and cases collected therein.

This Court considered the causation issue in Perkins v. Standard Oil Company of California, 395 U.S. 642 (1969), although the result was not directly cast in terms of either of the two analytical techniques utilized by the lower courts. In Perkins, a Robinson-Patman Act price discrimination case, two Perkins corporations engaged in the wholesale gasoline business were held to have been damaged by reason of discriminatory lower prices charged by Standard Oil to their competitors. In addition to corporate damage, this Court directed that Perkins individually be allowed to

recover damages because the two failing corporations were unable to pay him agreed brokerage fees for securing gasoline, rental on leases of service stations and other indebtedness. This Court held that Perkins "was no mere innocent bystander; he was the principal victim of the price discrimination practiced by Standard. Since he was directly injured and was clearly entitled to bring this suit, he was entitled to present evidence of all of his losses to the jury." 395 U.S. at 649-650.

The parallel between Perkins and the instant case compels a finding of causation in this case. While Eberline is not a plaintiff it was nevertheless damaged by reason of the resale restrictions because they prevented Eberline from selling the products directly to the Bell Telephone Companies, as well as to non-Bell purchasers. The further threat of Western Electric to cease doing business with Eberline, if carried out, would have eliminated Eberline from this business entirely, an injury analogous to the injury suffered by the two Perkins corporations as a result of Standard Oil's price discrimination.[5]

5 It should be recognized at this point that Eberline's market for these products at the time was exclusively the Bell Telephone Companies, and through the resale restrictions Western Electric had obtained total control of this portion of Eberline's business.

Thus, Standard Oil conducted its business dealings with the two Perkins corporations in such a way (discriminatory higher prices) that they failed. Western Electric conducted its business dealings with Eberline in such a way (resale restrictions) that Eberline was unable to sell directly to the Bell Telephone Companies or to non-Bell purchasers, and would be unable to sell the specified products at all if Western Electric terminated their relationship. In Perkins it was the failing of the two Perkins corporations which caused Perkins individual damage. In the instant case it was the initial impairment of Eberline's business and later the threat of the destruction of this business which caused Eberline to terminate its relationship with Beltronics and hence Beltronics' ultimate damage. The resale restrictions, therefore, acted directly upon Beltronics by first preventing Beltronics from selling directly to the Bell Telephone Companies and later by forcing Eberline to accede to Western Electric's directive to terminate Eberline's relationship with Beltronics.

A finding of causation is also compelled by both the "target area" and "direct injury" approaches, even if the factual analogy to Perkins did not exist. Before applying these two approaches to the facts of the instant case, however, they must be considered in light of the Perkins decision. Perkins has been construed to have implicitly undermined, by analogy, the more restrictive "direct injury" approach with its holding that a

"fourth level" price discrimination is encompassed within the language of Section 2(a) of the Robinson-Patman Act (15 U.S.C. §13(a)). This Court characterized the lower court's refusal to find a causal connection between the supplier's violation and damage to the plaintiff who competed with the fourth level purchaser from the supplier as creating an artificial limitation "completely unwarranted by the language or purpose of the" Robinson-Patman Act. 395 U.S. at 647. This Court stressed the nature of the competitive harm, and not the relationship between Perkins and the defendant, when it stated that "the competitive harm done him by Standard is certainly no less because of the presence of an additional link in this particular distribution chain from the producer to the retailer". 395 U.S. at 647. In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d at 128. Perkins has also been construed to give direct support to the "target area" approach since a "target area" case, Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955), was cited by the Court just prior to the holding that Perkins as an individual was directly injured by the antitrust violation. In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d at 128-129.

Application of the apparently favored "target area" approach requires that a plaintiff's business be "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry". e.g.,

Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54-55 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952). The pertinent area of the economy in the instant case is clearly the manufacture and sale of the subject products, an area unquestionably encompassing Beltronics which was the exclusive sales agent of a manufacturer for sale of the subject products.

The "direct injury" approach focuses primarily on the relationship between the defendant and the plaintiff. In the instant case Beltronics dealt directly with Western Electric on behalf of the manufacturers it represented. It stood squarely between Western Electric (and the Bell Telephone Companies) and the manufacturers it represented in all sales matters. The resale restrictions operated directly upon Beltronics in this position by (1) preventing its selling directly to the Bell Telephone Companies, as it had once done, and by (2) depriving Beltronics of even indirect access to sales to the Bell Telephone Companies through Western Electric when Western Electric refused to do further business with it. Since Beltronics' business at the time was selling the subject products to the Bell Telephone Companies, at first directly and later indirectly through Western Electric, Western Electric's refusal to do further business with Beltronics completely destroyed Beltronics' business.

Further, Beltronics had a direct contractual relationship with Eberline through the Exclusive Sales Representative Agreement. The resale restrictions in the supply contract between Western Electric and Eberline operated directly on this contractual relationship by denying Beltronics the right granted it in the Exclusive Sales Representative Agreement to sell the subject products to the telephone industry throughout the United States.

CONCLUSION

The decision of the Court below on the legality of the resale restrictions conflicts with this Court's decision in Schwinn. If this decision is not corrected it will stand as authority for evasion of the Schwinn doctrine in other industries through creation of unnecessary levels in the distribution process, and other artifices placing form over reality.

The Court of Appeals' further decision that Beltronics was not injured by the resale restrictions conflicts with this Court's decision in Perkins. Additionally, the holding that there was no injury conflicts with both of the analytical techniques applied by virtually all the lower courts when considering the causation requirement of Section 4 of the Clayton Act.

For the reasons stated in this Petition the Writ should be granted.

Respectfully submitted,

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Dated: March 27, 1975

CERTIFICATE OF SERVICE

This is to certify that I have this date served the attached Petition for Writ of Certiorari on Eberline Instrument Corporation and Capco, Inc. by depositing three copies of the same in a United States Post Office, airmail postage prepaid, addressed to their counsel of record Robert C. Poole, Poole, Tinnin, Danfelser & Martin, Suite 816, Bank of New Mexico Building, Albuquerque, New Mexico 87102, and on Western Electric Company, Incorporated by depositing three copies of the same in a United States Post Office, first class postage prepaid, addressed to its counsel of record, Stuart S. Gunckel, Room 1300, 931 - 14th Street, Denver, Colorado 80202.

All parties required to be served have thus been served.

John T. Willson

JOHN T. WILLSON

March 27, 1975

APPENDIX

(Filed December 3, 1973)

BELTRONICS, INC., et al.,
Plaintiffs,

v.

EBERLINE INSTRUMENT CORPORATION, et al.,
Defendants.

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

(Civil Action No. C-1598)

Dwight A. Hamilton and John T. Willson, of Fuller & Evans, Denver, Colo. for Plaintiffs.

Robert C. Poole and Robert W. Harris, of Poole, Tinnin, Danfelser & Martin, Albuquerque, N. M., for defendants Eberline Instrument Corp., and Capco, Inc.

Stuart S. Gunckel and Robert A. Dick, of Rovira, DeMuth & Eiberger, Denver, Colo., for defendant, Western Elec. Co., Inc.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

CHILSON, District Judge.

STATEMENT OF THE CASE

This action came on for trial to the Court without a jury on the 12th day of November, 1973, and was concluded on November 26, 1973.

The Court after hearing the evidence, the argument of counsel and having received written briefs of the parties, took the case under advisement for the purpose of preparing written Findings of Fact and Conclusions of Law.

This action arose out of a series of transactions whereby the plaintiff Beltronics and the defendants, Eberline and Capco, undertook to supply Western Electric with certain devices called "capacitors" and "capacitor cases" for use by the Bell Telephone System.

The issues submitted to the Court for determination can best be defined after setting forth the Findings of Fact. Most of the material facts are not in dispute and in those areas where the material evidence is in conflict, these Findings of Fact reflect the Court's resolution of those conflicts.

FINDINGS OF FACT

The Bell Telephone system consists of twenty-three operating companies which are subsidiaries of the American Telephone and Telegraph Company. (A.T.&T.)

The defendant, Western Electric Company (Western Electric) is a wholly-owned subsidiary of A.T.&T. One of its principle functions is to purchase supplies, equipment, and materials for use in the Bell system.

One of the means of accomplishing this purpose is by supply contracts entered into between Western Electric and suppliers by which a supplier agrees to sell its products to Western Electric, upon order, at stated prices and in accordance with stated specifications to control the quality of the products.

The supply contract by its terms is for a limited period of time and provides no right of renewal by either party, but ordinarily if performance has been satisfactory, and if the price for the product can be agreed upon, the supply contract is renewed or a new supply contract is entered into for another specific period of time.

For some years prior to 1960, the plaintiffs, King and Peterson had sold capacitors manufactured by Goodall Electric Company, to some of the operating companies of the Bell system.

In 1960, Midwec Corporation of Oshkosh, Nebraska, began to manufacture capacitors. Midwec Corporation entered into an Agreement with Midwec Sales Co., a company controlled by King and Peterson, whereby Midwec Sales would act as the exclusive sales representative of Midwec Corporation in the sales of capacitors and capacitor cases. In the name of Midwec Sales, King and Peterson continued to sell capacitors and capacitor cases to the operating companies of the Bell system until 1962.

In 1961, Western Electric advised Midwec Corporation that the magnitude of the sales to the Bell operating companies required the development of specifications for the products and a supply contract with Western Electric.

After tests of the products by the Bell Telephone Laboratory specifications were prepared, tests were made and in March 1962 Midwec Corporation and Western Electric entered into a supply contract. Midwec Sales Company continued to be the exclusive sales representative of Midwec Corporation for the sale of the capacitors until September 1967, when the contract between Midwec Corporation and Midwec Sales Corporation was terminated by mutual agreement.

In 1966, Western Electric expressed to Midwec Sales a desire for a second source of supply of the products to avoid overdependence on Midwec Corporation for a supply of capacitors and cases.

When Midwec Corporation and Midwec Sales terminated their Agreement in 1967, King proposed to Eberline that it manufacture the capacitors and capacitor cases and thereby become the second source of supply of these products to Western Electric.

After lengthy negotiations, a plan was adopted and carried out by which Eberline acquired Capco, Inc., a Texas Corporation with a plant at Lubbock, Texas, to manufacture the capacitors and capacitor cases and Eberline also acquired all of the stock of Midwec Sales Company (whose name was changed to Beltronics, Inc.) and Beltronics was made the marketing organization. King and Peterson became the principal officers of Beltronics.

Basic to this plan, was the knowledge of the parties that the market for the products was limited almost entirely, if not entirely to Western Electric and that without a supply contract with the Western Electric Company, the venture could not succeed. The plaintiffs, Eberline and Capco, in entering upon this venture, acted upon the basic assumption that a supply contract with Western Electric would be obtained and maintained. This basic assumption was also implicit in the modification of the venture in January 1969 when the parties modified their original Agreement by the execution of Exhibits A and B referred to later in these Findings.

Once the plan was adopted, Beltronics began negotiations with Western Electric for a supply contract with the expectation that such a contract would be executed by May 1, 1968. Due to the failure of one of the products to meet the tests required by Western Electric, and due to some confusion at Western Electric of the relationship of Beltronics, Eberline, and Capco to each other and which entity should be the contracting party, the Eberline contract was not executed until August 1968. Eberline was the contracting party and the contract expired by its terms on April 30, 1969.

Upon the execution of the supply contract, Capco produced the products and Beltronics took charge of the marketing of the products under the supply contract.

In the course of time, Eberline became dissatisfied with the expense incurred by Beltronics and desired to shift the burden of the sales expense to those doing the selling. As a result of negotiations had in December 1968, King and Peterson agreed to purchase from Eberline all of the Beltronics stock for certain considerations including an agreement by Eberline and Capco that for a period of five years, and an option for a five-year extension, Beltronics would be the exclusive sales representative for the sale of the capacitors and capacitor cases to the telephone industry and would receive a commission of 15% on such sales. In Jan-

uary 1969, written agreements to effect these modifications of the original plan were executed. (Exhibits A and B.)

In its capacity as exclusive sales representative, Beltronics through its President, Mr. King, pursued negotiations for a new supply contract with Western Electric to become effective May 1, 1969, when the then existing supply contract expired.

In late February 1969 at the request of Western Electric, Beltronics submitted a new price quotation for a supply contract for the period from May 1, 1969, to May 1, 1970. Not having heard from Western Electric after the submission of this quotation, King in early April, went to New York to inquire about the new supply contract. On April 2, he was informed by Mr. Tubman of Western Electric, that the supply contract would not be renewed.

King immediately appealed to Mr. Tubman's superior, Mr. Lander, who said he would let King know the following week if anything could be done. When King telephoned Lander the following week, Lander informed him the decision not to renew the supply contract would stand.

At this time, King knew or had reason to believe that the decision of Western Electric not to renew the supply contract was motivated by alleged improper conduct on the part of the King which violated Western Electric policy with regard to

entertainment of and the giving of gifts to its employees. King told Lander that he would resign as President of Beltronics and let Peterson take over if that would save the supply contract. Lander agreed to talk to Peterson and a meeting in New York was scheduled for April 4, 1969.

Eberline and Capco were advised of the situation and arranged for Mr. Vance and Mr. McGonagle (President and Vice President of Eberline) and Mr. Wood, President of Capco to attend the meeting with Mr. Peterson.

At the meeting of April 14, Western Electric spokesmen made it clear that Western Electric would do no further business with Mr. King or Beltronics or anyone associated with them.

Upon Eberline's assurance that its relationship with Beltronics as a subsidiary of Eberline had been terminated and that Eberline would have no association with Beltronics in the future, Western Electric accepted a quotation from Eberline in lieu of the one previously submitted by Beltronics and eventually Eberline received a supply contract from Western Electric.

On April 21, 1969, Eberline and Capco advised Beltronics that because of Western Electric's refusal to do business with Beltronics and Mr. King, Eberline and Capco ". . . have elected to rescind

the captioned agreement (the exclusive sales representative agreement) on the ground, among others, of complete failure of consideration on the part of Beltronics and impossibility of performance by Beltronics." (Exhibit S.)

Eberline and Capco did not comply with the termination provisions of paragraph 16a of the Agreement, which provided for termination prior to the expiration of the ten-year term of the Agreement upon ninety days notice and payment to Beltronics of $75,000.00.

The decision of Western Electric not to renew the Eberline supply contract was made about the middle of March 1969 by Mr. Bredder, then General Manager of purchasing for Western Electric, after reviewing the matter with the Vice President of Purchasing. The decision was made unilaterally by Western Electric without prior consultation with Beltronics, Eberline, or Capco. The decision was first revealed by Mr. Tubman of Western Electric to Mr. King at a meeting with Mr. King in New York on April 2, 1969.

The reasons which motivated Mr. Bredder's decision were three:

1. Alleged violations by Mr. King of Western Electric's entertainment and gift policies;

2. Mr. King's alleged improper acquisition of an "Index of Purchase Contracts" published by Western Electric for internal use and Mr. King's alleged improper use thereof;

3. Uncertainty of the respective roles of Beltronics, Eberline and Capco and confusion as to which should be the contracting party.

VIOLATIONS OF ENTERTAINMENT AND GIFT POLICIES

On February 27, 1969, one S. Frank Artale, an employee in the purchasing organization of Western Electric gave to Western Electric a written statement (Exhibit ZZZ) which among other things, stated that Mr. King, President of Beltronics, had on two occasions paid for a "dinner at the Tower Suite for four people, my mother, father, wife, and myself. I provided verbally to King data concerning price quotes concerning build-out capacitors. I did this at King's suggestion and in a way to more or less pay him back for his hospitality. I presently have from King an additional complimentary charge ticket for the Tower Suite that I had planned to utilize on March 22, 1969."

This was in violation of Western Electric's entertainment policy. King, while admitting some entertainment of Mr. Artale including providing once for dinner

at the Tower Suite for Mr. Artale and his family, denied that he knew that this was in violation of Western Electric's policy.

INDEX OF PURCHASE CONTRACTS

Western Electric publishes monthly, an "Index of Purchase Contracts", which furnishes the names of those having supply contracts with Western Electric. These are distributed to the various purchasing houses of the Western Electric system and this index is used in ordering supplies, equipment, and materials.

After Eberline obtained its supply contract in August 1968, there was a delay in including Eberline's supply contract in the index and it was not until November of 1968 that Eberline was listed.

In the meantime, Mr. King was of the opinion that the absence of Eberline from the index was affecting the volume of orders received by Beltronics. He complained to various Western Electric representatives about the matter including a Mr. Dunton, who was in the purchasing department of Western Electric. Mr. Dunton looked at his copy of the index and noticing that it was not the current one threw it in the waste basket near where Mr. King was sitting. When Mr. King left Mr. Dunton's office, he took the index from the waste basket without asking Mr. Dunton for permission to do so.

Mr. King had Eberline's name inserted on pages 21 and 24 of the index, had the altered pages duplicated and sent them to the buyers of Western Electric houses throughout the country.

Western Electric deemed this to be an improper acquisition of an internal and confidential document and an improper use thereof.

King justified his acquisition and use of the index because Western Electric had not included Eberline in its index after the supply contract was executed.

UNCERTAINTY OF RELATIONS BETWEEN BELTRONICS, EBERLINE AND CAPCO

That there was ground for confusion on the part of Western Electric as to the relationship of these three companies is sustained by the evidence. The supply contract itself designates Beltronics as the manufacturer of the products when the truth is that Capco was the manufacturer and Beltronics was the marketing organization.

The Court finds that Western Electric in March 1969, had reasonable grounds to believe that Mr. King had violated the entertainment and gift policy of Western Electric; that Mr. King had improperly acquired and used the "Index of Purchase Contracts" and that there was uncertainty as to the relationship among Beltronics, Eberline, and Capco.

The Court finds that the decision of Western Electric in March 1969 to refuse to deal with Mr. King or Beltronics or anyone associated with them, including Eberline, was unilaterally made by Western Electric and that it was not made in accordance with any plan, scheme, or design by Western Electric or by Eberline and Capco or by a combination of the three to suppress competition or to restrain or to monopolize trade in violation of the Federal Anti-Trust Laws.

PLAINTIFFS' CLAIMS

The plaintiff has alleged four statements of claim. A summary of each of these claims is found at Page 1 of the plaintiffs' trial brief filed November 5, 1973, and succintly states the nature of each claim. We here incorporate the plaintiffs' summary as a prelude to our conclusions of law.

> "First Claim-Plaintiff Beltronics, Inc. ("Beltronics") charges Defendants Eberline Instrument Corporation ("Eberline") and Capco, Inc. ("Capco") with a breach of an Exclusive Sales Representative Agreement between Beltronics, and Eberline and Capco, Exhibit A to the Complaint, and seeks $75,000.00 plus sales commission of $9,553.97 pursuant to Section 16(a) of that Agreement.
>
> "Second Claim-In the event relief is denied on the First Claim, Plaintiff

Beltronics seeks cancellation of a promissory note given by Beltronics to Capco, and Plaintiffs W. Arther Peterson ("Peterson") and James E. King ("King") seek cancellation of their guarantees of said promissory note, all on the grounds that the consideration for the promissory note and the guarantees thereof has failed.

"Third Claim-Plaintiff Beltronics charges Defendant Western Electric Company, Incorporated ("Western Electric") with maliciously, intentionally, and without legal justification, interfering with the contractual relationship which existed between Beltronics, and Eberline and Capco, which relationship was evidenced by the Exclusive Sales Representative Agreement, Exhibit A to the Complaint, and seeks damages of $650,000.00.

"Fourth Claim-Plaintiff Beltronics charges Defendants Western Electric, Eberline and Capco with violations of Section 1 of the Sherman Act, and Defendant Western Electric with violation of Section 2 of the Sherman Act, and seeks single damages of $650,000.00, trebled to $1,950,000.-00, plus reasonable attorney's fees and costs of suit."

CONCLUSIONS OF LAW

FIRST CLAIM-Breach of Contract.

This claim is predicated on an alleged breach of the Exclusive Sales Agreement (Exhibit A) in that the defendants Eberline and Capco did not terminate the agreement in the manner specified by Section 16a which provides in its pertinent parts as follows:

> "In addition to the option to terminate this Agreement under certain conditions as provided in paragraph 15, Eberline may terminate this Agreement at any time by giving Beltronics notice in writing of termination at least ninety (90) days prior to the termination date and by paying Beltronics the sum of $75,-000.00._ _ _"

Admittedly, Eberline and Capco did not comply with this provision of the contract.

The question is whether or not this constitutes an actionable breach of the contract.

The Court found as a matter of fact that the parties in executing Exhibit A did so upon the basic assumption that Western Electric, which was the only market of any consequence for the products here involved, would continue to be a market for those products and that

without Western Electric as a market the venture could not succeed.

The refusal of Western Electric to deal with Beltronics or Mr. King or with Eberline, so long as it was associated with them, made performance of the Exclusive Sales Agreement impossible.

Upon the facts as found by the Court, the Court concludes as a matter of law that Exhibit A was subject to an implied condition that if, without fault of the parties, the Western Electric market ceased to be available for the sale of the products, the Agreement would be dissolved and the parties excused from performing it.

The Western Electric market was foreclosed by the unilateral action of Western Electric, without fault on the part of Eberline and Capco, and the implied condition of the Agreement caused the Agreement to be dissolved, and excused the parties from further performance. Thus, Eberline and Capco were not required to comply with Section 16a of Exhibit A and their failure to do so does not constitute an actionable breach of the Agreement.

The Court concludes that the plaintiff is not entitled to recover upon its First Claim.

SECOND CLAIM-Cancellation of Note

This claim is an alternative claim in the event the plaintiff is denied relief on the first claim.

The disposition of this claim requires some additional findings of fact.

The second claim for relief seeks a cancellation of a promissory note executed by Beltronics to Capco dated December 31, 1968. The payment of this note was guaranteed by King and Peterson personally in the Agreement of January 1, 1969, (Exhibit B) wherein King and Peterson agreed to purchase all of the stock of Beltronics from Eberline and Capco.

The Court finds from the evidence that in the course of its operations as a subsidiary of Eberline, Beltronics became indebted to Capco and that the parties agreed that the amount of such indebtedness as of December 31, 1968, was $21,-970.85, and to evidence that indebtedness, Beltronics executed and delivered to Capco its promissory note for that amount dated December 31, 1968. The execution of the note was a recognition by Beltronics of the indebtedness of Beltronics to Capco existing at that time.

The Court further finds that King and Peterson prior to the execution of the purchase of stock agreement of January 1, 1969, (Exhibit B) had no personal liability for that indebtedness. By the terms

of the purchase agreement (Exhibit B) King and Peterson personally guaranteed the payment of the note.

The Court finds that the obligation of Beltronics upon the promissory note which it executed on December 31, 1968, is supported by adequate consideration received by Beltronics prior to the execution of Exhibit B in January of 1969.

Upon the facts as found by the Court, the Court concludes as a matter of law that Beltronics is not entitled to a cancellation of the note and the indebtedness represented thereby and the counterclaim of Capco for judgment on the note against Beltronics should enter.

SECOND CLAIM-Cancellation of the Personal Guarantee of King and Peterson

Prior to the execution of the purchase agreement of January 1, 1969, (Exhibit B) whereby King and Peterson agreed to purchase the Beltronics stock from Eberline, King and Peterson had no personal liability for the debts of Beltronics.

The purchase agreement (Exhibit B) provides:

> "In consideration of the mutual agreement wherein Buyers (King and Peterson) recognize this obligation (the note) on behalf of Beltronics and jointly, severally, and personally guarantee payment of the aforesaid note."

This is the only basis for a personal liability of King and Peterson to pay the indebtedness represented by the note.

We have previously found that from its inception, the venture entered into between Beltronics, Eberline, and Capco was based on the assumption that a supply contract with Western Electric would be obtained and maintained.

This basic assumption remained the foundation for the dealings of the parties in January 1969, when the parties executed Exhibit B whereby King and Peterson agreed to purchase the stock of Beltronics and when the parties executed Exhibit A, the exclusive sales representative agreement.

From the evidence, the Court finds that the consideration for the guarantee by King and Peterson was the exclusive sales agreement which the parties assumed would remain in force and effect for a minimum of five years and a maximum of ten years.

Upon these facts, the Court concludes as a matter of law that there was a failure of consideration for the guarantee of the note by King and Peterson and they are entitled to judgment for cancellation of their guarantee.

THIRD CLAIM

The third claim seeks to recover from Western Electric damages for a wrong-

ful, malicious, and intentional inducement of a breach of the exclusive sales agreement between Beltronics and Eberline and Capco. Upon the facts as found by the Court, the Court concludes as a matter of law that the plaintiff is not entitled to recover upon its third claim; that the refusal of Western Electric to deal with the plaintiff or anyone associated with it was an exercise of a legal right and such refusal was not illegal or unlawful, was not tortious and is not actionable.

FOURTH CLAIM-Anti-Trust Violations

Under the facts as found by the Court, the Court concludes as a matter of law that the plaintiff is not entitled to recover upon its fourth claim based on alleged violations of Sections 1 and 2 of the Sherman Act.

The facts as found by the Court do not support plaintiff's allegations that Western Electric, Eberline, and Capco contracted, combined, or conspired in restraint of interstate trade in violation of Section 1 of the Sherman Act; or that they contracted, combined, or conspired in a group boycott of Beltronics in violation of Section 1 of the Sherman Act; or that Western Electric in providing a source of supply of capacitors for the Bell system, exercised a monopoly power in violation of Section 2 of the Sherman Act.

Upon the facts as found by the Court, the Court concludes as a matter of law:

A. That Western Electric had a legal right not to deal with Beltronics and its exercise of that right did not violate Sections 1 or 2 of the Sherman Act.

B. That the acts of the defendants as found by the Court did not constitute a violation of Sections 1 or 2 of the Sherman Act.

C. Assuming arguendo that the acts of the parties or any of them were in violation of either Sections 1 or 2 of the Sherman Act, the injury and damage suffered by the plaintiff were not proximately caused by any unlawful restraint or monopolization of trade in violation of Sections 1 and 2 of the Sherman Act, but were proximately caused by Western Electric's exercise of its legal right to refuse to deal with Beltronics or with Eberline and Capco so long as they were associated with Beltronics.

D. That the plaintiff is not entitled to recover on its fourth claim for relief.

ORDER

It is therefore ordered, adjudged and decreed, that judgment of dismissal of all claims of Beltronics shall be entered and that the defendants have judgment against Beltronics for their costs to be

taxed by the Clerk of the Court upon the filing of a Bill of Costs.

It is further ordered, adjudged, and decreed that the guarantee by the plaintiffs, King and Peterson, of payment of the promissory note executed by Beltronics to Capco, Inc. dated December 31, 1968, in the principal amount of $21,970.85, is hereby set aside and cancelled and said plaintiffs are absolved from any obligation for the payment of that indebtedness by virtue of their guarantee. King and Peterson shall have judgment against Capco, Inc. for their costs to be taxed by the Clerk of the Court upon the filing of a Bill of Costs.

It is further ordered, adjudged, and decreed that judgment be entered in favor of Capco, Inc. and against Beltronics for the indebtedness represented by the promissory note executed by Beltronics to Capco, Inc. and dated December 31, 1968, which amount has been stipulated by the parties to be $8,617.11 after allowing all just credits, together with the interest accrued thereon. Judgment shall be entered upon the surrender to the Clerk of this Court of the original promissory note and a stipulation by the interested parties of the interest due and owing upon the agreed principal amount.

(Filed December 4, 1974)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1044, November Term, 1974

BELTRONICS, INC., Plaintiff-Appellant,
v.
EBERLINE INSTRUMENT CORPORATION, CAPCO, INC. and WESTERN ELECTRIC COMPANY, INCORPORATED, Defendants-Appellees.

Appeal From the United States District Court For the District of Colorado
(D. C. No. C-1598)

Dwight A. Hamilton and John T. Willson (Fuller and Evans, on brief) for Plaintiff-Appellant.

Robert C. Poole (Marshall G. Martin, Robert W. Harris and Poole, Tinnin, Danfelser & Martin, on brief), for Defendants-Appellees Eberline Instrument Corporation and Capco, Inc.

Stuart S. Gunckel (Rovira, DeMuth & Eiberger and Akolt, Dick & Akolt, on brief), for Defendant-Appellee Western Electric Company, Incorporated.

Before: BREITENSTEIN, HILL and Mc WILLIAMS, Circuit Judges.

BREITENSTEIN, Circuit Judge. This suit was brought in Colorado state court as a contract case and was removed to federal court on diversity grounds. After removal, Western Electric Company, Inc., was added as a defendant and the complaint was amended to charge anti-trust violations. The district court held for defendants and plaintiff Beltronics, Inc., has appealed. We affirm.

Beltronics, Inc., is a Colorado corporation and is the successor to Midwec Sales Co. W. Arthur Peterson and James E. King are officers of Beltronics and were officers of Midwec Sales.

Eberline Instrument Corp., defendant-appellee, is a New Mexico corporation, and has a wholly owned subsidiary, Capco, Inc., a Texas corporation, which is also a defendant-appellee.

Western Electric Company, Inc., a New York corporation and defendant-appellee, is a wholly owned subsidiary of American Telephone and Telegraph Company (AT&T) which as the Bell Telephone System has 23 operating companies. The Bell System provides over 80% of the telephone service in the United States.

The products involved in the transactions among the parties will be referred to as capacitors.

In 1960 Midwec Sales, controlled by Peterson and King, became the exclusive representative of a Nebraska manufacturer in the sale of capacitors. Midwec Sales sold capacitors to Bell System operating companies until 1967. In 1961 Western gave notice that the magnitude of capacitor sales to Bell System operating companies required development of specifications for capacitors and a supply contract with Western. Specifications were prepared and a supply contract executed. In 1966 Western determined that a second supplier of capacitors was needed to avoid over-dependence on one source. The contract between the Nebraska manufacturer and Midwec Sales was terminated in 1967. King proposed to Eberline that it manufacture capacitors and become the second supply source for Western. Eberline acquired Capco, to make the capacitors, and all the stock of Midwec Sales, the name of which was changed to Beltronics. Beltronics was made the marketing agent for capacitors produced by Capco. Peterson and King were the principal officers of Beltronics. The contract with Eberline was the only substantial asset of Beltronics.

In January 1969 Eberline sold its Beltronics stock to Peterson and King and made a 5-year renewable contract with Beltronics by which Beltronics became

Eberline's exclusive sales agent for the sale of capacitors to the telephone industry. Beltronics' commission on those sales was 15%.

The Western-Eberline contract was due to expire April 30, 1969. Beltronics submitted a new price quotation for a 1-year renewal contract. In April, 1969, Western told Beltronics that the Eberline supply contract would not be renewed. The decision resulted from King's conduct violating Western policies.

At a New York meeting on April 14 Wesern made clear that it would do no further business with King, Beltronics, or anyone associated with them. Eberline terminated its contract with Beltronics and later secured a new supply contract from Western Electric.

Beltronics then sued for breach of contract, tortious interference with contract relations, and antitrust violations by Western, Eberline, and Capco. After a two-week trial the district court made comprehensive findings of fact and conclusions of law. Some of the issues resolved are not pertinent to this appeal.

I

The January 2, 1969, "Exclusive Sales Representative Agreement" made by Eberline and Capco with Beltronics was for five years and was renewable at the option of Beltronics for another five years.

Paragraph 15 provided for termination at the option of Eberline under conditions which relate to sales performance by Beltronics and production capacity of Eberline. Eberline claims no right to terminate under this provision. The controversy concerns the following portion of paragraph 16(a):

> "In addition to the option to terminate this Agreement under certain conditions as provided in paragraph 15, Eberline may terminate this Agreement at any time by giving Beltronics notice in writing of termination at least ninety (90) days prior to the termination date and by paying Beltronics the sum of $75,-000.00, ***."

Eberline did not give 90 days' notice and did not pay the $75,000.

We reject Beltronics' attack on the findings of the trial court. They have record support and are not clearly erroneous. The court found that Western's refusal to renew the capacitor supply contract was caused by King's violation of Western's entertainment and gift policies, and his improper acquisition and use of a Western publication intended for internal information. The Western decision was made unilaterally without participation by Eberline or Capco.

The question is whether the termination by Eberline and Capco without notice or payment to Beltronics was an actionable breach. The trial court found: (1) The contract was made on the assumption that the Western market for capacitors would continue. (2) The refusal of Western to deal with Beltronics made performance impossible. (3) The contract was subject to the implied condition that if without fault of the parties the Western market became unavailable, "the Agreement would be dissolved and the parties excused from performing it." (4) The Western market was foreclosed by the unilateral action of Western "without fault on the part of Eberline and Capco." (5) The implied condition of the contract caused it "to be dissolved, and excused the parties from further performance." Accordingly, the court held that termination by Eberline and Capco was not an actionable breach.

We reject Beltronics' argument that the situation is covered by contract ¶15. That provision contemplated sales activities by Beltronics. That activity was ended by the unilateral action of Western. Paragraph 16(a) is in effect a buy-out clause. When Western refused to do business with Beltronics, nothing remained for Eberline to buy.

The unilateral decision of Western not to do business with Beltronics destroyed all possibility of performance. It makes no difference whether the issue be labeled

"impossibility," "failure of consideration," or "commercial frustration" because the crucial inquiry is whether the equities of the case place the risk on Beltronics or Eberline. Lloyd v. Murphy, Calif., 153 P.2d 47, 50. We have a supervening event caused by the conduct of Beltronics without any contributory fault on the part of Eberline. See 6 Corbin, Contracts, §1354, pp. 458-459, and Restatement, Contracts, §457, p. 849. The inability of Beltronics to make sales to Western made the contract inoperative. See Winans v. Landstrom Furniture Corporation, 7 Cir. 132 F.2d 457, 459.

The arguments of Beltronics that the $75,000 payment was for services rendered and to reimburse for the purchase by King and Peterson of the Beltronics stock are without record support.

The Western-Eberline contract required Eberline to make the capacitors in accordance with Western's specifications, to incorporate only cable sold to it by Western, and to use that cable for no other purpose. Beltronics argues that to relieve Eberline from performance sanctions a restraint of trade, and that the defense of impossibility is unavailable because Eberline agreed to restrictive provisions which made Beltronics' performance impossible. Beltronics negotiated the agreement which contained the restrictions. The evidence does not support the claim that, absent the restrictions, Beltronics could have sold to

other Bell System companies. Beltronics' loss was not caused by the restrictions but by its own conduct which resulted in Western's decision to stop business relations.

II

Beltronics asserts that Western tortiously interfered with the Beltronics-Eberline contract and intentionally induced a breach thereof. We have held that no breach occurred. The issue then is whether Western wrongfully interfered with the contract relationship. We take the findings of the trial court to be that whatever interference occurred was justified. Beltronics does not deny the actions of King which caused the Western decision. Indeed, Beltronics concedes that Western had the right to end its dealing with Beltronics. It argues that King's actions bore upon the Western-Beltronics, not the Eberline-Beltronics, relationship. This does not follow because Western could legitimately refuse to purchase, either directly or indirectly, from or through Beltronics. Determination of "unwarranted interference" depends on the facts of each case, Watson v. Settlemeyer, Colo. 372 P.2d 453, 456, and is a question for the fact finder. See Order of Railway Conductors v. Jones, Colo. 239 Pac. 882, 883. The record sustains the trial court and we agree that Western was guilty of no tortious interference.

III

We turn to the antitrust claims. Beltronics argues that the restrictions in the Western-Eberline contract on the purchase of cable and the sale of capacitors made with that cable constitute a per se violation of §1 of the Sherman Act, 15 U. S. C. §1, within the holding in United States v. Arnold, Schwinn & Co., 388 U.S. 365. Schwinn was concerned with a contract between a producer and a distributor in which the producer imposed restrictions on resales by the distributors and retailers. We are not concerned with a vertical relationship such as that in Schwinn. The Court there was concerned with the anticompetitive effects of a manufacturer's restrictions downstream in the channels of distribution.

We are concerned with an agreement for the sale by Western to Eberline of cable and the sale of capacitors by Eberline to Western. In Schwinn the manufacturer parted with dominion, and the restrictions on sale affected transaction by distributors and retailers. In our case we have no impediment to competition. Eberline purchased cable from Western, used the cable in making capacitors, and sold the capacitors to Western. In effect Western bought the cable back, albeit in a different form. Schwinn has no application. The record discloses no restraint of trade in violation of the Sherman Act. In any event we find noth-

ing in the record to show that Beltronics was, or could have been, damaged by the restrictions.

IV

Beltronics also argues that a per se Sherman Act violation is established because it was the victim of a group boycott by Western and Eberline. Reliance is placed on Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207. Broadway-Hale, a powerful competitor of Klor's, instigated a wide combination of manufacturers and distributors to sell not at all, or on highly disadvantageous terms, to price-cutting Klor's.

Klor's is not pertinent, and we find no evidence of any group boycott here. There is no combination, either horizontal or vertical, to exclude competitiors or influence the trade practices of a boycott victim. See Worthen Bank & Trust Co. v. National BankAmericard, Inc., 8 Cir., 485 F.2d 119, 124, cert. denied, 42 LW 3468. Instead of the elimination of a competitor at some level, we have the elimination of a non-competing middleman. See Bushie v. Stenocord Corp., 9 Cir., 460 F.2d 116.

There is no unreasonable restraint of trade here. Western was free to buy capacitors from anyone. Its selection of Eberline cannot be stretched into a claim

of a §1 violation. Beltronics' admitted violation of Western policies caused the Western decision to end the relationship. There is no intimation of any connivance with Eberline or anyone else.

Affirmed.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

November Term - December 31, 1974

Before Honorable Jean S. Breitenstein, Honorable Delmas C. Hill, and Honorable Robert H. McWilliams, Circuit Judges.

No. 74-1044

BELTRONICS, INC., a Colorado corporation,
Plaintiff-Appellant,

W. ARTHUR PETERSON, and JAMES E. KING,
Plaintiffs,

v.

EBERLINE INSTRUMENT CORPORATION,
a New Mexico corporation, and
CAPCO, INC., a Texas corporation,
WESTERN ELECTRIC COMPANY, INC.,
a New York Corporation,
Defendants-Appellees.

This matter comes on for consideration of Appellant's Petition for Rehearing filed in the captioned cause.

Upon consideration whereof, the Petition for Rehearing is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk